

REMARKS

Claims 1-4 are pending in the present application. Claims 1-3 have been amended. Claim 1 has been amended to replace "SEQ ID NO:4" with "SEQ ID NO:5". Claim 1 has also been amended for clarity, following the wording used in issued parent patent USP 6,727,409. Claim 3 has also been amended to recite the "wherein" language of claim 1. Since this language was not previously objected to or rejected by the Examiner, it is believed that no issues are raised by this amendment. Claims 2 and 3 have been further amended to depend from claim 1. No new matter has been added by these amendments. As such, entry thereof is respectfully requested.

Objections to the claims

Claim 1 was objected to for the recitation of "the protein of SEQ ID NO:4" with the notation that SEQ ID NO:4 is a nucleic acid sequence. Claim 1 has been amended to replace SEQ ID NO:4 with SEQ ID NO:5. Withdrawal of the objection is respectfully requested.

Rejections under 35 U.S.C. §112, 1st paragraph

Claims 2-3 have been rejected under 35 U.S.C. §112, 1st paragraph, for lack of written description. The Examiner reiterates that the specification disclosed only a single species of the claimed genus, i.e. SEQ ID NO:4. The Examiner further asserts that the recited structural features of SEQ ID NOS:2 and 3 do not constitute a substantial portion of the genus because SEQ ID NOS:2 and 3 are not sufficient to encode a protein having insecticidal activity, the remainder of the protein having insecticidal activity is undefined and specification does not define the remaining necessary structural features.

Claims 2-3 have been further rejected under 35 U.S.C. §112, 1st paragraph for lack of enablement with the assertion that the specification is only enabled for polynucleotides encoding amino acids 44-658 of SEQ ID NO:5, but not for polynucleotides encoding polypeptides having insecticidal activity and comprising nucleotides 198-1561 of SEQ ID NO:1 or nucleotides 1-1145 of SEQ ID NO:3.

Claims 2 and 3 have been amended to depend from claim 1 and to thereby incorporate all of the limitations of claim 1. Since claim 1 has been deemed adequately supported and enabled, claims 2 and 3 are similarly in compliance with the requirements for 35 U.S.C. §112, 1st paragraph.

Rejections for non-statutory obviousness-type double patenting

Claims 1-3 have been rejected for non-statutory obviousness-type double patenting as being obvious over claims 6 and 10 of USP 6,727,409. Attached hereto is a terminal filed in view of the '409 patent. Withdrawal of the rejection is therefore respectfully requested.

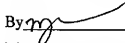
In view of the above amendments and Remarks, Applicant believes the pending application is in condition for allowance.

Should there be any outstanding matters that need to be resolved in the present application, the Examiner is respectfully requested to contact MaryAnne Armstrong, Ph.D., Reg. No. 40,069 at the telephone number of the undersigned below, to conduct an interview in an effort to expedite prosecution in connection with the present application.

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies to charge payment or credit any overpayment to Deposit Account No. 02-2448 for any additional fees required under 37.C.F.R. §§1.16 or 1.14; particularly, extension of time fees.

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Respectfully submitted,

By  _____

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Attachment: Terminal Disclaimer